

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

LAKISHA QUIANA HARRIS,

Defendant-Appellee.

UNPUBLISHED
February 24, 2005

No. 250925
Wayne Circuit Court
LC No. 03-002214

Before: Talbot, P.J., Whitbeck, C.J., and Jansen, J.

PER CURIAM.

The prosecution appeals by delayed leave granted from a sentence of five years' probation imposed on a plea-based conviction for possession with intent to deliver 225 to 649 grams of cocaine, MCL 333.7401(2)(a)(ii). We remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The parties agreed that defendant should be sentenced under MCL 333.7401(2) as amended by 2002 PA 665 and that the guidelines set a minimum sentence range of fifty-one to eighty-five months. MCL 777.62. The trial court elected to depart downward from the guidelines, citing defendant's lack of a prior record, her cooperation "in a sense" with the authorities, the fact that defendant was a mule in the transaction and had "no drug history or anything like that," that defendant was active in her community and her church, that defendant had stable employment and that defendant was "seeking an education."

The trial court's determination regarding the existence of a reason or factor warranting departure is a factual determination that is reviewed on appeal under the clearly erroneous standard. The determination that a particular factor is objective and verifiable is reviewed by this Court as a matter of law. The trial court's determination that objective and verifiable factors present a substantial and compelling reason to depart from the statutory minimum sentence is reviewed for an abuse of discretion, which "occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *People v Babcock*, 469 Mich 247, 273-274; 666 NW2d 231 (2003).

The court must impose a minimum sentence within the guidelines range unless a departure from the guidelines is permitted. MCL 769.34(2). The court may depart from the guidelines if it "has a substantial and compelling reason for that departure and states on the record the reasons for the departure." MCL 769.34(3). The court may depart from the

guidelines for nondiscriminatory reasons where there are legitimate factors not considered by the guidelines or where factors considered by the guidelines have been given inadequate or disproportionate weight. MCL 769.34(3)(a), (b); *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001).

“[T]he Legislature intended ‘substantial and compelling reasons’ to exist only in exceptional cases.” *People v Fields*, 448 Mich 58, 68; 528 NW2d 176 (1995). A substantial and compelling reason must be objective and verifiable. *Babcock*, *supra* at 272. Objective and verifiable factors are “actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed.” *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). A departure is appropriate “if there are substantial and compelling reasons that lead the trial court to believe that a sentence within the guidelines ranges is not proportionate to the seriousness of the defendant’s conduct and to the seriousness of his criminal history,” such that a departure would result in “a more proportionate criminal sentence than is available within the guidelines range.” *Babcock*, *supra* at 264. The court may not simply cite a list of objective and verifiable factors, but must explain why those factors justify the departure from the guidelines. *Id.* at 272; *People v Johnson (On Remand)*, 223 Mich App 170, 173; 566 NW2d 28 (1997).

The trial court erred in finding that defendant lacked a prior record. The presentence report shows that she had one misdemeanor conviction. While defendant’s minimal prior record is objective and verifiable, it is a factor considered by the guidelines, MCL 777.51 through MCL 777.55, and cannot be used to justify a departure unless the trial court finds that it has been given inadequate weight. *Babcock*, *supra* at 258 n 12. Here, the court made no such finding.

Defendant’s cooperation with law enforcement officials is an objective and verifiable factor not considered by the guidelines which “should be given special attention by the sentencing court.” *Fields*, *supra* at 77. The parties stipulated that defendant had been cooperative without specifying what she had done. Thus, the trial court did not err in finding that defendant cooperated with the police and could properly consider this factor in deciding whether to depart from the guidelines. Whether this factor constituted a substantial and compelling reason for departing from the guidelines cannot be determined from this record because no one identified the nature of defendant’s cooperation. Thus, further articulation is required.

The guidelines take into consideration defendant’s role in a multiple offender situation, MCL 777.44, but not whether defendant was delivering the cocaine for her own benefit or on behalf of someone else. Where a defendant merely provides transportation for the seller and is not participating for a profit, he is considered “less culpable” than the seller and a departure from the guidelines may be warranted. *Fields*, *supra* at 76. Here, the parties agreed that defendant was a “mule,” but did not explain further. The record does not show that defendant was simply doing a favor for a friend by delivering the cocaine as opposed to providing a courier service for a personal profit. Further, the trial court clearly erred in finding that defendant had “no drug history or anything like that.” The presentence report shows that while defendant had no contact with the criminal justice system for drug offenses, she admittedly used marijuana three or four times a week for over six years. Therefore, the trial court abused its discretion in finding that defendant’s status as a “mule” and lack of a drug history warranted a downward departure from the guidelines.

Defendant's community and church activities are not considered by the guidelines and active involvement in volunteer work is objective and verifiable. *People v Krause*, 185 Mich App 353, 358; 460 NW2d 900 (1990) overruled in part on other grounds by *Fields, supra* at 77. However, there is nothing in the record to show that defendant was involved in volunteer work or other community service through her church or an independent organization. While the record shows that defendant is a church-goer, that is not so out of the ordinary that it keenly or irresistibly grabs one's attention. *Babcock, supra* at 272. Therefore, the trial court abused its discretion in finding that this factor warranted a departure from the guidelines.

Defendant's employment history and education are objective and verifiable factors not considered by the guidelines. A defendant's employment does not, standing alone, attain the level of substantial and compelling. *Krause, supra* at 359. However, a stable, long-term work history bodes well for a defendant's rehabilitative potential, see *People v Daniel*, 462 Mich 1, 7 n 8; 609 NW2d 557 (2000); *People v Shinholster*, 196 Mich App 531, 535; 492 NW2d 502 (1992), and may, when considered in tandem with other relevant factors, warrant a departure. *Shinholster, supra*. A defendant's pursuit of a post-secondary education is a factor that may be considered in deciding whether a departure is warranted. *People v Perry*, 216 Mich App 277, 280, 282; 549 NW2d 42 (1996). The presentence report showed that defendant left college in December 2002 and no evidence was presented to verify defendant's claim that she had returned to school.

The trial court departed from the guidelines based on one factor that is already considered by the guidelines without finding that it was given inadequate weight and based on other factors that were not fully verified or which do not constitute substantial and compelling reasons. Moreover, the trial court failed to explain why the factors it cited made a probationary sentence more proportionate to the circumstances of the offender and the offense than the prison sentence recommended by the guidelines. Accordingly, we remand for resentencing. *Babcock, supra* at 260-261, 271.

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ William C. Whitbeck
/s/ Kathleen Jansen